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W. R. STARK

Argued by

DAVID L. PODELL.

Supreme Court of the United States

OCTOBER TERM, 1924.

Nos. 104, 105, 106.

HYGRADE PROVISION CO., INC., E. GREENEBAUM
CO., INC., and GUCKENHEIMER & HESS, INC.,
Appellants,

—against—

CARL SHERMAN, as Attorney General of the State of New
York, and JOAB H. BANTON, as District Attorney
of the County of New York,

Appellees.

LEWIS & FOX COMPANY,

Appellants,

—against—

THE SAME,

Appellees.

HARRY SATZ,

Appellant,

—against—

THE SAME,

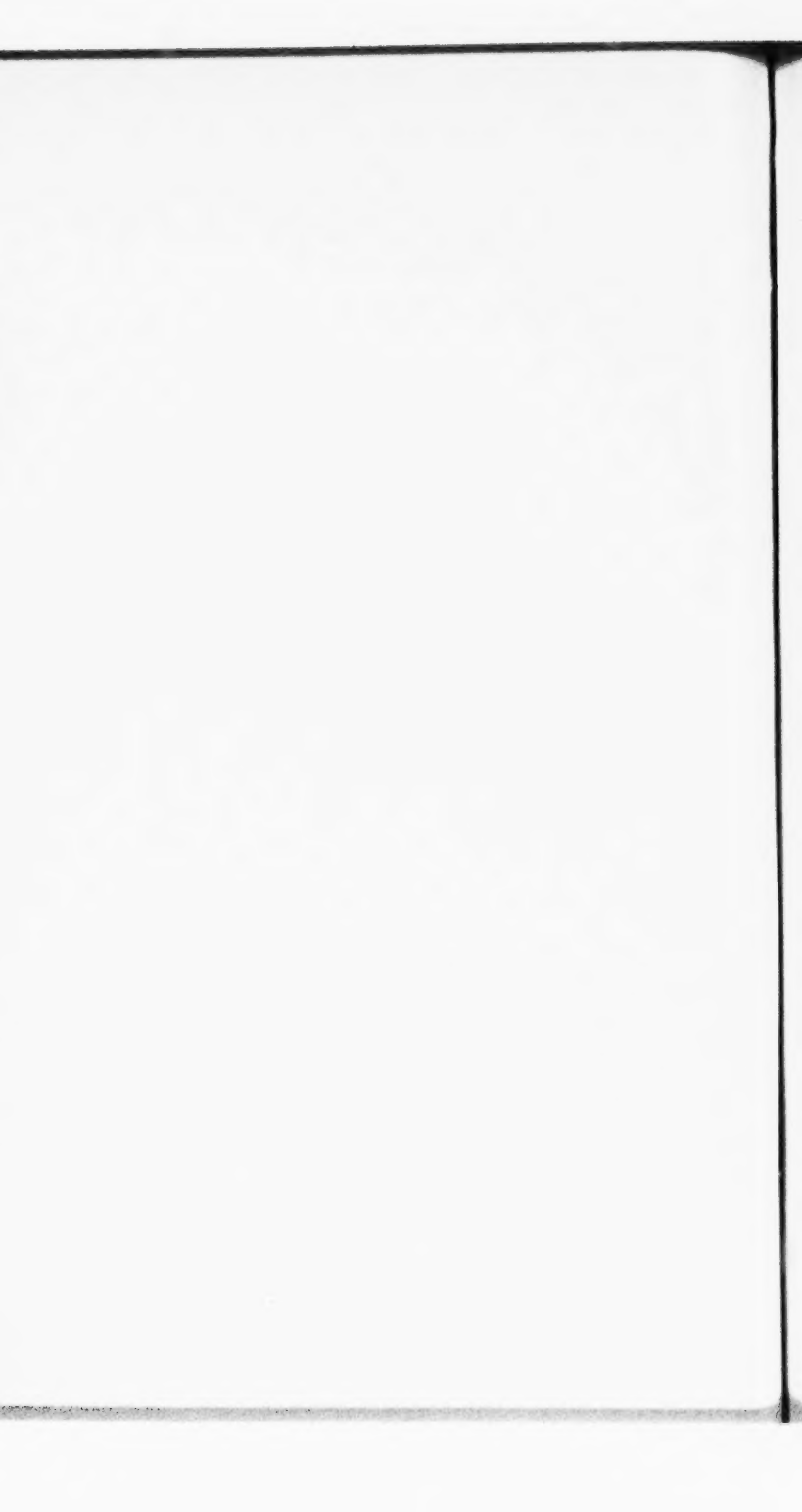
Appellees.

APPEALS FROM THE DISTRICT COURT OF THE
UNITED STATES FOR THE SOUTHERN
DISTRICT OF NEW YORK.

BRIEF FOR APPELLANTS.

DAVID L. PODELL,
Attorney for Appellants.

DAVID L. PODELL,
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Supreme Court of the United States

HYGRADE PROVISION CO., INC.,
E. GREENEBAUM CO., INC. and
GUCKENHEIMER & HESS, INC.,
Appellants,

—against—

CARL SHERMAN, as Attorney
General of the State of New
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as District Attorney of the
County of New York,
Appellees.

No. 104.

LEWIS & FOX COMPANY,
Appellants,

—against—

THE SAME,
Appellees.

No. 105.

HARRY SATZ,
Appellant.

—against—

THE SAME,
Appellees.

No. 106.

PRELIMINARY STATEMENT.

These cases present for consideration the constitutionality of Chapters 580 and 581 of the Laws of 1922, enacted by the New York State Legislature. They arise on appeals from decrees of the Statutory Court, organized pursuant to Section 266 of the Judicial Code, denying the applications for preliminary injunctions and granting the motions to dismiss the bills of complaint. Chapter 580 has been incorporated in the Penal Law and is

known as Section 435a. Chapter 581 amends and takes the place of subdivision 4 of Section 435 of the Penal Law.

The Court will note that Chapter 580 is a separate and independent section, and is not a subdivision of any pre-existing statute, whereas Chapter 581 is known and designated as subdivision 4 of Section 435 of the Penal Law. The material portion of Chapter 581 reads, as follows:

(A person, who, with intent to defraud):

* * * "4. Sells or exposes for sale any meat or meat preparation and falsely represents the same to be kosher, or as having been prepared under and of a product or products sanctioned by the orthodox Hebrew religious requirements; or falsely represents any food product or the contents of any package or container to be so constituted and prepared, by having or permitting to be inscribed thereon the word 'kosher' in any language; or sells or exposes for sale in the same place of business both kosher and non-kosher meat or meat preparations who fails to indicate on his window signs and all display advertising, in block letters at least four inches in height, 'kosher and non-kosher meat sold here'; or who exposes for sale in any show window or place of business both who fails to display over such meat or meat kosher and nonkosher meat or meat products preparation so exposed a sign in block letters at least four inches in height reading 'kosher meat', or 'nonkosher meat,' as the case may be, * * *

(Is guilty of a misdemeanor).

(There is a further provision in the original chapter that it shall take effect immediately).

The material portion of Chapter 580 reads as follows:

"A person, who, with intent to defraud sells or exposes for sale any meat or meat preparation and falsely represents the same to be kosher, whether such meat or meat preparation be raw or prepared for human consumption, or as having been prepared under and of a product or products sanctioned by the orthodox Hebrew religious requirements; or falsely represents any food product or the contents of any package or container to be so constituted and prepared, by having or permitting to be inscribed thereon the word 'kosher' in any language; or sells or exposes for sale in the same place of business both kosher and non-kosher meat or meat preparations, either raw or prepared for human consumption, who fails to indicate on his window signs and all display advertising, in block letters at least four inches in height, 'kosher and nonkosher meat sold here'; or who exposes for sale in any show window or place of business both kosher and nonkosher meat or meat preparations, either raw or prepared for human consumption, who fails to display over each kind of meat or meat preparation so exposed a sign in block letters at least four inches in height reading 'kosher meat,' or 'nonkosher meat,' as the case might be, is guilty of a misdemeanor."

(There is a further provision in the original chapter that it shall take effect September 1st, 1922.)

These two sections constitute amendments and amplifications of the pre-existing subdivision 4 of the same section of the Penal Law, which had been enacted in 1915 and which provided as follows:

(A person, who, with intent to defraud):

"Orthodox Hebrew requirements"

* * * "4. Sells or exposes for sale any meat or meat preparation and falsely represents the same to be kosher, or as having been prepared under and of a product or products sanctioned by the orthodox Hebrew religious requirements; or falsely represents any food product or the contents of any package or container to be so constituted and prepared, by having or permitting to be inscribed thereon the word 'kosher' in any language" (Is guilty of a misdemeanor).

The grounds urged for the unconstitutionality of these enactments are as follows:

1. The standard of criminality established by these statutes is based upon a finding of fact by a jury of a body of law *wholly foreign* to the common law and our system of jurisprudence.

2. There is nowhere in any of the statutes a definition, limitation, or explanation of the word "kosher" or the term "orthodox Hebrew religious requirements."

3. The positive obligation under these statutes to indicate on window signs and display advertising, and also to display over each meat or meat preparation, the term "nonkosher," attaches and carries with it an unnecessary and unjustifiable stigma against pure food, with the resulting implication of uncleanness, unwholesomeness, and undesirability.

4. The appellants herein are being deprived of life, liberty, and property without due process of law in violation of the 14th amendment in that their lawful business is being burdened and destroyed

with arbitrary, unreasonable, and impossible restrictions.

5. The appellants herein are likewise being denied the equal protection of the laws in violation of the 14th amendment in that they are being arbitrarily singled out and discriminated against by this legislation by reason of these unreasonable, onerous, and oppressive restrictions.

6. These statutes are further in violation of the commerce clause of the Constitution of the United States, in that they impose unreasonable, arbitrary, and oppressive burdens upon the interstate business of the appellants.

7. There is a further objection to Chapter 580 on the ground that it eliminates as an ingredient of criminality the intent to defraud, and makes an honest mistake in a vague, uncertain, and indefinite field of knowledge, a crime punishable by imprisonment.

THE FACTS.

The case entitled *Hygrade Provision Co., Inc., E. Greenbaum Co., Inc., and Guckenhimer & Hess, Inc. vs. The Attorney General and the District Attorney of the State of New York*, is brought in behalf of provision manufacturers who have places of business within the City of New York and who are under duty to label their meats in accordance with the provisions of the Statutes. Their products are sold also in states other than the State of New York, in their original packages. The *Lewis & Fox* case is brought in behalf of a foreign corporation, which has its meat products resold in their original packages within the

State of New York. The *Harry Satz* case involves the constitutionality of the statutes in so far as they affect a delicatessen man, who is under duty to label his meats with the above signs and notices. In each case, the complainants set forth that they have invested large amounts of money in building up and establishing an extensive business and valuable good will, which in the case of each complainant far exceeds the sum of \$3,000. *They have sold delicatessen and meat preparations which are approved under the laws and regulations of the Department of Agriculture, and bear Government labels as being clean, pure, wholesome food.* Such meats are, according to the honest belief of the complainants, kosher, so far as the complainants have been able to ascertain.

The bills of complaint then allege the passage of the original subdivision 4 of Section 435 of the Penal Law, which is the unamended section of the so-called Kosher Laws. The bills then allege the enactment of Chapters 580 and 581 of the Laws of 1922. Under both of these chapters any person, who sells or exposes for sale in the same place of business both kosher and nonkosher meat or meat preparations, must indicate on his window, signs and all display advertising in block letters of at least four inches in height that kosher and nonkosher meats are sold there; or who exposes for sale in any show window or his place of business both kosher and nonkosher meat or meat preparations, must display over each kind of meat or meat preparation so exposed, a sign in block letters at least four inches in height reading "kosher meat or nonkosher meat," as the case may be.

The phrase "orthodox Hebrew religious requirements" and the term "kosher" are vague, indefinite, uncertain, and incapable of correct and common

definition. The term "kosher" may be described as meaning clean, fit, proper, according to the orthodox Hebrew religious requirements, and the term "nonkosher" has taken on a definite meaning of unfit, unclean, and improper and clearly inflicts a burdensome stigma upon the goods of the complainants.

The defendant Carl Sherman, as Attorney General of the State of New York, and the defendant Joab H. Banton, as District Attorney of the County of New York, have threatened to prosecute all complaints of persons engaged as manufacturers, dealers, delicatessen owners, butchers, or otherwise engaged in the sale of raw prepared meat commodities, who are charged with violating the provisions of the statutes hereinbefore referred to.

By reason of the aforesaid threats of prosecution on the part of the defendants, and by reason of the fear inspired by the enactments and by the requirements of the above laws, the complainants and their customers when called upon at their peril to determine whether any meat or meat products are kosher or not kosher and to label the same in accordance with the requirements of the statute herein set forth, have decided and will continue to decide that the products sold by the complainants are not kosher, to the great detriment and injury of the complainants' good will and established trade.

The determination and decision on the part of the complainants have been and will be entirely induced by the fear that some Judge or jury might determine that the Jewish Law or the customs, traditions, and precedents of the orthodox Hebrew religious requirements necessitate that such meats as the complainants sold as kosher are not kosher. Any meat or meat products which are sold from the complainants' premises with the label kosher

thereon are, according to the best information and belief of the complainants, prepared in strict accordance with what the complainants honestly believe to be the orthodox Hebrew religious requirements, in so far as it is humanly possible for the complainants to determine what such requirements are. *The complainants, however, sell only such meats as are clean, wholesome, proper food commodities, carefully inspected, and eminently fit and desirable for human consumption.*

That by reason of the foregoing, the complainants will be irreparably damaged by serious losses, destruction, and interference with their trade, good will, and business reputation, all of which far exceed the sum of \$3,000, in the case of each of the complainants. The good will of each complainant will in course of time be destroyed. Their investment of many thousands of dollars in plant and equipment and other property will be substantially diminished in value, if not rendered wholly valueless.

In the *Levix & Fox* case, the complainant sets forth, in addition, that a vast proportion of the meats and meat products coming into the State of New York comes from States other than the State of New York. The complainant sells and ships into the State of New York from the State of Massachusetts more than \$60,000 worth of meats and provisions every year. The goods sold by the complainant are delivered from the City of Boston, in the State of Massachusetts to points within the State of New York, to purchasers and consumers within the State of New York, in their original unbroken packages.

Unless restrained and enjoined by the process of the Court, the defendants in enforcing the provisions of the foregoing enact-

ment will continue to threaten prosecution of all those who do not comply with the foregoing provisions, and will intimidate and annoy all the complainant's numerous customers selling meat and meat products within the State of New York. Their course will be followed by other prosecuting attorneys within the State of New York, the inevitable effect of which will be to interfere and obstruct the complainant in the conduct of business in the State of New York causing it great financial loss, interfering with its property rights in the said meats and meat preparations, and its right to sell the same freely within the State of New York. It will thereby inflict great and irreparable injury upon the complainant which it will be impossible to compensate in damages or accurately to ascertain, and for which there is no adequate legal remedy. Many of the persons engaged in the sale of the complainant's meats and meat products have already discontinued their purchases and sales of the said meat and meat preparations because of the fear of criminal prosecution induced by the threats of the said defendants as aforesaid.

That large numbers of those who were now handling such meat and meat preparations, and are at the present time buying and selling the same within the State of New York, will be hereafter induced by said threats to discontinue the sale thereof unless the defendants are restrained from threatening prosecution of them.

In the *Guckenheimer & Hess* case, similar allegations are set forth on the part of three New York manufacturers, who are selling at least \$2,500,000 worth of meat and meat preparations to places outside of the State of New York. Unjust burdens imposed by the statutes are an undue, unreasonable, and substantial interference with the interstate commerce of the complainants in the sale, shipment,

and delivery of these commodities from their places of business within the State of New York to points outside of the State of New York.

Preliminary injunctions were therefore sought to enjoin the defendants from enforcing the provisions of the law.

Since the defendants filed motions to dismiss the bills of complaint and did not interpose denials to the complainants' allegations, the facts as alleged by the bills of complaint must be assumed to be true. Thus the allegations that the phrase "orthodox Hebrew religious requirements" and the term "kosher" are vague, indefinite, uncertain, and incapable of correct and common definition are admitted by the pleadings and are deemed to be true and beyond controversy.

BASIS OF EQUITABLE JURISDICTION IN THESE CASES.

The right to injunctive relief in equity is based upon the familiar principles of *ex parte Young*, 209 U. S., 123, 147, 163. Where the enforcement of a void and unconstitutional criminal statute involves as well an unlawful interference with, or encroachment upon, the property rights of the complainant, an injunction will issue to restrain its enforcement.

This principle has since been applied in numerous suits in equity brought in accordance with the same procedure. In those Lever Act cases which dealt with equitable relief, *Tedrow vs. Lewis*, 255 U. S., 98; *Kennington vs. Palmer*, 255 U. S., 100, 101, and several other equitable suits arising under the Lever Act, reported in the next few pages of the same volume, this Court directly decided that even under a statute where wilfulness and a specific criminal intent are essential elements of the crime (compare discussion of the statute, and allegation of wilful-

ness in the indictment, contained in the main Lever Act case, *U. S. vs. Cohen Grocery Co.*, 255 U. S., 81 at page 86), deprivation of property falling within the rule of *ex parte Young* (*Supra*) will entitle the complainant to restrain the enforcement of a criminal statute.

In each of the following authoritative cases, this Court has held that similar suits were properly brought in equity:

Wilson vs. New, 243 U. S., 332;
Adams vs. Tanner, 244 U. S., 590;
Hamilton vs. Kentucky Distilleries, 251 U. S., 146;
Ruppert vs. Caffey, 251 U. S., 264;
Fort Smith & Western Railroad vs. Mills, 253 U. S., 206.

The same procedure was likewise followed in *Hammer vs. Dagenhart*, 247 U. S., 251. In each of the above cases, the Court held that an alleged interference with the established business of the complaint, and the loss of trade and good will, if well founded, damaged the complainant to the extent of at least \$3,000.

Constant infractions of the law by the complainants would lead to such an accumulation of fines and successive terms of imprisonment as to result in the practical prohibition against seeking the judicial construction of the law. On the other hand, if the complainants should obey the law and wait until the highest court would determine the question of validity of these laws, and it should then be determined that the laws were invalid, the property of the complainants would have been taken without due process of law.

In addition to the allegations of the complainants that their property in the nature of good will

and established trade is being interfered with to the extent of \$3,000, there is in the *Lewis & Fox* case, and in the *Hygrade Provision, et al* case, the additional element that interference with the customers of the complainants is a substantial interference with property rights.

In the case of *Savage vs. Jones*, 225 U. S., 501, the same procedure was approved by this Court. A state statute compelled the labelling of packages with a statement of certain ingredients, and the punishment of customers of the complainant who dealt in the commodity which had not been labelled in accordance with the statute. Since these commodities were resold in their original packages, the Court held that an interference by the prosecuting officers of the State with the purchasers of goods manufactured in, and shipped from other States, inflicted injury to the property rights of the manufacturer by reducing his sales. The Court held that the case was properly brought. The Court said, at page 520:

“An attack upon this right of the importing purchasers to sell in the original packages bought from the complainant, not only would be to their prejudice, but inevitably would inflict injury upon the complainant by reducing his interstate sales, a result to be avoided only through his compliance with the act by filing the statement and affixing to his goods the labels it required. According to the bill, the State Chemist had threatened the complainant that in default of such compliance he would cause the arrest and prosecution of every person dealing in the article within the State, and had distributed broadcast throughout the State warning circulars. If the statute of Indiana, as applied to sales by importing purchasers in

the original packages, constitutes an unwarrantable interference with interstate commerce in the complainant's product, he had standing to complain, and was entitled to relief, against enforcement by the defendant of the illegal demands. *Scott vs. Donald*, 165 U. S., 107, 112; *ex parte Young*, 209 U. S., 123, 159, 160; *Ludwig vs. Western Union Telegraph Co.*, 216 U. S., 146; *Hopkins vs. Clemson College*, 221 U. S., 636, 643, 645; *Philadelphia Co. vs. Stimson*, 223 U. S., 605, 620, 621."

INTERPRETATION AND CONSTRUCTION OF THE STATUTES INVOLVED.

The statutes under consideration are set forth on pages 2, 3, and 4 of this brief. Chapter 580 adds a new section to the Penal Law, Section 435a. Chapter 581 amends and takes the place of subdivision 4 of Section 435 of the Penal Law.

It will therefore be seen that before Chapters 580 and 581 were passed, the only provisions in the Penal Law with reference to selling nonkosher meat as kosher meat were contained in the language constituting the original subdivision 4 of Section 435 as above set forth.

The new language of Section 435 subdivision 4 and all of Section 435a were added by Chapters 580 and 581 because of the following situation. Under the original Section 435, a prosecution was started in New York against a butcher who had on his window the sign "kosher meat and poultry market" but who as a matter of fact, sold nonkosher meat as well as kosher meat. The Court held in this case (*People vs. Goldberger*, 168 N. Y. Supp., 578), that under such a state of facts Section 435 had not been violated for the reason that the sign on the window was not a declaration that

all of the meat sold or offered for sale was kosher meat, and that so long as any part of the meat offered for sale was kosher meat, the sign was not a misrepresentation. Chapters 580 and 581 were introduced for the purpose of overcoming the effect of this decision. An examination of all of the new part added to Section 435 will show that it has to do merely with the person who sells *both* kosher and nonkosher meat and it provides that such a person shall indicate on his window in four inch letters the words "kosher and nonkosher meat sold here" and should likewise label the kosher and non-kosher meat contained within the store.

The question then arises as to the purposes for which Chapter 580 was passed. An examination of Section 435a, added by Chapter 580, as compared with the new subdivision 4 of Section 435, as created by Chapter 581, reveals the following resemblances and differences. Subdivision 4 of Section 435 is included within the operation of those words which appear at the head of the section, to wit, "a person, who, with intent to defraud." In other words, subdivision 4 is separated from subdivision 1, 2 and 3 of Section 435 by the disjunctive "or" so that it itself is deemed to be included within the words "a person, who, with intent to defraud." Section 435a, however, cannot be construed in the same way. The words "a person, who, with intent to defraud" which begin the new section do not in form or appearance seem to apply to the section as a whole as in Section 435. On the contrary, the section is built up of co-ordinate clauses separated by semi-colons. Each clause is distinct by itself and outlines a separate and different offense. The only clause thus co-ordinated which contains the words "a person, who, with intent to defraud" is the first clause; the other clauses have no such provision.

A second difference is that Section 435a as added by Chapter 580 is to "take effect September 1st, 1922" whereas subdivision 4 of Section 435 as amended by Chapter 581 is to "take effect immediately."

As to the resemblances between the new Section 435a and the new subdivision 4 of Section 435, the language of both sections is identical except for the following immaterial differences. Section 435a in describing the words "any meat or meat preparation" has added the following in lines 3 and 11 respectively "whether such meat or meat preparation be raw or prepared for human consumption," and "either raw or prepared for human consumption." In line 15 of Section 435a as set forth on page 3 of this brief, the word "preparations" appears as "products" in Section 435, and in line 16 of the said Section 435a instead of the words "each kind of" Section 435 has the word "such." It will therefore be seen that so far as the material provisions of the language are concerned the sections are absolutely identical, except for the words, "a person, who, with intent to defraud."

Both of these laws were approved by the Governor of the State of New York on the same day, April 11th, 1922. Chapter 581 was introduced in the Assembly of the New York State Legislature on January 18th, 1922, and on the same day was introduced in the Senate. (New York State Legislative Index 1922). Chapter 580 was introduced in the Assembly on February 9th, 1922, and in the Senate on February 13th, 1922 (Id.) Chapter 581 passed in the Assembly on February 13th, 1922, and in the Senate on March 6th, 1922, Chapter 580 passed the Assembly on February 27th, 1922, and passed the Senate on March 6th, 1922. Thus the bills although introduced on separate dates passed the second house of the Legislature on the same

day, went to the Governor on the same day and were approved on the same day.

The question therefore arises as to what the difference between the two sections is. Why should both have been enacted? An examination of the structure of the sections will show the difference between them. In Section 435a the words "who, with intent to defraud" appear only in the first co-ordinate clause and are not repeated in any of the other clauses set off by semi-colons. Nor is it incorporated by reference in any portion of Section 435a subsequent to the first clause set off by the first semicolon. On the other hand, Section 435 makes the words "a person, who, with intent to defraud" apply to the entire section and to all its parts. Therefore, it is apparent that Section 435 requires as an element of the crime therein set forth the intention to defraud, whereas Section 435a does not include the intention to defraud in each of its subdivisions.

The Legislature intended, so far as the language appears, to create two misdemeanors. The first would involve as a necessary element the intention to defraud. This being merely an amendment of a prior statute, which in itself involves an intention to defraud, the Legislature made the Act take effect immediately. Section 435a, however, went very much further and provided that the mere selling with the improper labelling would in itself constitute a misdemeanor irrespective of the intention of the seller. This being a more far reaching enactment, the act was not made to take effect immediately but was not to take effect until September 1st, 1922. This was in accord with the general rule of legislation that when drastic and far-reaching legislation is passed without any emergency, the Legislature postpones the time of its taking effect so that the general public and business interests may have time to become acquainted with its provisions.

Furthermore, the punctuation of Section 435a must lead inevitably to the conclusion that only the first co-ordinate clause set off by a semi-colon involves the necessity of an intention to defraud whereas the other co-ordinate clauses set off by semi-colons do not make it necessary that the intention to defraud be present. In construing the language of a statute the Court will be aided by the punctuation in the said statute, and the Court of Appeals of New York has distinctly so held.

In the case of *Tyrrell vs. The Mayor*, 159 N. Y. 239, the statute to be construed by the court was a part of a charter of the City of New York and read as follows:

“The annual salaries and compensations of the members of the uniformed force of the department of street cleaning shall be fixed by the board of estimate and apportionment and shall not exceed the following: Of the general superintendent, three thousand dollars; of the assistant superintendent, two thousand five hundred dollars; of the superintendent of stables, two thousand dollars; of the master mechanic, one thousand eight hundred dollars; of the superintendent of final disposition, two thousand dollars; of the assistant superintendent of final disposition, one thousand five hundred dollars; of the district superintendents, one thousand eight hundred dollars each; of the time collectors, one thousand two hundred dollars each; of the section foremen, one thousand dollars each; of the dump inspectors, one thousand dollars each; of the assistant dump inspectors, nine hundred dollars each; of the tug and scow inspectors, one thousand dollars each; of the dump boardmen, seven hundred

and twenty dollars each ; of the sweepers, seven hundred and twenty dollars each ; of the drivers seven hundred and twenty dollars each ; of the stable foremen, one thousand two hundred dollars each ; of the assistant stable foremen, nine hundred dollars each ; *of the hostlers, seven hundred and twenty dollars each, and extra pay for work on Sundays.*"

The plaintiff in that case was a section foreman in the street cleaning department, who had worked several Sundays and who was seeking to recover of the City extra pay for such work according to the provisions of the charter above quoted. The court held, however, that by an examination of the punctuation, it was evident that the legislature intended the extra pay for work on Sundays to apply only to hostlers, because each occupation was set off by a semi-colon into a distinct clause and the provision for extra pay was included in only one of the clauses set off by the semi-colon. The court, in its opinion, emphasizes the fact that punctuation in the acts of the New York Legislature is an important part of the statute and is of material aid in defining the intention of the Legislature, in the following language (at page 242) :

"The punctuation of this statute is of material aid in learning the intention of the legislature. While an act of parliament is enacted as read and the original rolls contain no marks of punctuation, a statute of this state is enacted as read and printed, so that the punctuation is a part of the act as passed and appears in the roll when filed with the secretary of state. The Constitution provides that, except in a case of necessity, formally certified by the governor, every bill must be printed 'in its final

form' and placed upon the desks of members of the legislature at least three days prior to its passage, and upon the final reading no amendment is allowed. (Const. art. 3, Section 15.)

The punctuation, however, is subordinate to the text and is never allowed to control its plain meaning, but when the meaning is not plain, resort may be had to those marks, which for centuries have been in common use to divide writings into sentences, and sentences into paragraphs and clauses, in order to make the author's meaning clear. The sentence under consideration contains more than two hundred words, divided into nineteen clauses. The first clause, separated from the rest by a colon, is general, and applies the command of the legislature to all that follow. The rest of the sentence consists of eighteen clauses, each separated from and made independent of the others by an intervening semicolon. While each must be read in connection with said general command, neither need be read in connection with any other part of the sentence. Each clause contains a comma, separating the position named from the salary belonging to it, and is complete in itself, except that it depends for a part of its meaning upon the primary command with which the sentence opens. The words relating to extra pay are not separated from the remaining words of the clause by a semicolon, as would be expected if they applied to the preceding clauses, but by a comma, which indicates an intention to limit their application to the clause in which they appear. This clear system of punctuation forbids, as we think, that the last words of the last clause, viz., 'and extra pay for work on Sundays,' should be read as a part of each of the other clauses

except the first, which is obviously general in its application. The effect of the punctuation is the same as if the sentence was divided into eighteen independent sentences, with the first clause a part of each."

Following the language of Chapter 580 it would certainly appear on the authority of the above cases that Section 435a is to be construed as a combination of four co-ordinate sentences, each set off by semi-colons, with the provision "a person, who, with intent to defraud" applying only to the first clause.

U. S. vs. Goldenberg, 168 U. S., 95, also involved the construction of co-ordinate and independent clauses as they appeared in the following statute, approved June 10th, 1890, Chapter 407, 26 Stat., 131, 137:

"That the decision of the collector as to the rate and amount of duties chargeable upon imported merchandise * * * shall be final and conclusive against all persons interested therein, unless the owner * * * shall, within ten days after 'but not before' such ascertainment and liquidation of duties, as well as in cases of merchandise entered in bond as for consumption, or within ten days after the payment of such fees, charges, and exactions, if dissatisfied with such decision give notice in writing to the collector, setting forth therein distinctly and specifically, and in respect to each entry or payment, the reasons for his objections thereto, and if the merchandise is entered for consumption shall pay the full amount of the duties and charges ascertained to be due thereon."

The Circuit Court of Appeals certified to the Supreme Court of the United States the question

as to whether it was necessary for the owner to pay the duties as well as give notice of protest within ten days after the liquidation of such duties in order to have the matter reviewed. The Court held on page 102 that the statute contained

"two separate clauses, each prescribing a condition. One is, 'shall within ten days after "but not before" * * * give notice' etc. and the other, 'shall pay the full amount of the duties,' etc. In the latter no time is mentioned, and, the clauses being independent, there is no grammatical warrant for taking the specification of time from the one and incorporating it in the other."

It would therefore be improper for the Court in the present case to take the provision "a person, who, with intent to defraud," which exist in the first independent clause of Section 435a and incorporate it in the three other independent clauses.

See also in the matter of the Application of *Roberts*, 157 Cal., 472 at page 474, where the Court in interpreting a statute similarly composed of several disjunctive and separate clauses said:

"Although comprising but a single sentence, Section 337-a of the Penal Code creates many distinct offenses. It begins by the phrase 'every person', and each subsequent clause is connected therewith by appropriate punctuation. It is written in the disjunctive throughout, and the several offenses therein described are apparently as distinct and independent of each other as if they had been enacted in separate sections. In general, when such form of expression is used, the effect of the language pertaining exclusively to each offense described is not affected or modified by the words used

solely in describing the other offenses, but the description of each is to be construed as if it stood alone and were read in connection with the general words applying to all."

Both Chapters 580 and 581 were passed and approved on the same day. They apply to the same general subject matter and to the same kind of crime. It is difficult to see why both of these statutes should have been passed each taking effect at a different time unless there was this difference between them, namely, that the one, Chapter 581 prescribed a fraudulent intent as a fundamental of the misdemeanor whereas Chapter 580 made the acts a misdemeanor irrespective of the intent. That is the only difference of any fundamental importance between the two chapters. It must be presumed that the legislature of the State of New York was not so devoid of intelligence as to pass two statutes each providing the same thing, to take effect on different days, unless there was this essential difference between the two enactments. It is a fundamental rule in statutory construction as laid down by Mr. Justice Field early in the history of this court in the case of *U. S. vs. Tynen*, 11 Wall. 88, at page 92, that

"When there are two acts upon the same subject the rule is to give effect to both if possible."

Unless we follow the obvious grammatical construction of the two sections so as to lead to the inevitable conclusion that the one necessitates an intent whereas the other does not, we must necessarily say that the Legislature of New York passed two statutes*almost identical in language for the same offense on the same subject so that one of them may be completely disregarded and without

mutilating the legislative intent. The court must, however, if possible construe the chapters so that both are given some effect.

In view of the fact that these statutes were approved on the same day and apply to the same subject-matter they are *in pari materia* and must be construed together in order to read the legislative intent. As was said by this court in the case of *Kohlsaat vs. Murphy*, 96 U. S., 153, 159 :

"In the exposition of statutes, the established rule is that the intention of the law-maker is to be deduced from a view of the whole statute, and every material part of the same; and where there are several statutes relating to the same subject, they are all to be taken together, and one part compared with another in the construction of any one of the material provisions, because, in the absence of contradictory or inconsistent provisions, they are supposed to have the same object and as pertaining to the same system. Resort may be had to every part of a statute, or, where there is more than one *in pari materia*, to the whole system, for the purpose of collecting the legislative intention, which is the important inquiry in all cases where provisions are ambiguous or inconsistent.

Rules and maxims of interpretation are ordained as aids in discovering the true intent and meaning of any particular enactment; but the controlling rule of decision in applying the statute in any particular case is, that, whenever the intention of the legislature can be discovered from the words employed, in view of the subject-matter and the surrounding circumstances, it ought to prevail, unless it lead to absurd and irrational conclusions, which

should never be imputed to the legislature, except when the language employed will admit of no other signification."

When we look at both of the statutes now before the Court, we must come to the conclusion that the legislature could not have intended otherwise than to make a fraudulent intention unnecessary under Chapter 580, for otherwise we would have two distinct enactments creating and punishing but one offense.

Such a situation was declared to be an anomaly and one to be avoided in the construction of a statute if at all possible.

U. S. vs. Sterer, 222 U. S., 167, was a case involving a writ of error to review a judgment quashing an indictment as not stating an offense triable in the western district of Kentucky. The statute under which the indictment was drawn was Section 3894, Revised Statutes as amended which provided that

"no letter, postal-card, or circular concerning any lottery * * * or other similar enterprise offering prizes dependent upon lot or chance, or concerning schemes devised for the purpose of obtaining money or property under false pretenses, * * * and no lottery ticket or part thereof, * * * shall be carried in the mail or delivered at or through any post-office or branch thereof * * *."

The section further provided that any person violating this provision is guilty of a misdemeanor and can be indicted in the district either where the letter was mailed or where it was delivered. The indictment charged that the defendant devised a cer-

tain scheme for the purpose of obtaining money "by and under false pretenses" and pursuant thereto, the defendant through letters mailed in Iowa to certain persons in Kentucky made false and fraudulent representations as to certain cattle to be sold and that the said letters were delivered in Kentucky to the persons to whom they were addressed. The defendant claimed that proceedings should have been brought under Section 5480 which provides that

"if any person having devised or intending to devise any scheme or artifice to defraud, * * * to be effected by either opening or intending to open correspondence or communication with any person * * * by means of the Post-Office Establishment of the United States, shall, upon conviction be punishable etc."

It will be noted that there is no provision in this Section 5480 allowing the indictment to be laid in the district where the letter was received. The government claimed, however, that the indictment was properly brought under Section 3894 because that section includes "schemes devised for the purpose of obtaining money or property under false pretenses." The defendant claimed that it should have been brought under Section 5480 as a "scheme or artifice to defraud." The Court held that the two sections must be read together and that they were intended to prevent the use of the mail for certain purposes; that the one applies to the use of the mail for the purpose of promoting lotteries or other like schemes of chance, and that the other was intended to prohibit the use of the mail to carry on schemes of general fraud, the language being "any scheme or artifice to defraud." The Court so construed the statutes that the one section would not include a

crime under the other section on the theory that otherwise there would be two sections to punish one offense. The Court said at page 173:

"If, then, this indictment is also maintainable under Section 3894, it must be because we are forced to conclude that Congress, when it revised the statutes, intended to make the use of the mails to effect a scheme to defraud indictable and punishable under either of two distinct provisions, *and that the district attorney might elect as to which he would proceed under. Such a supposition is not to be lightly adopted. To so conclude would result in the anomaly of an offense created and punished by two distinct enactments.* Under the one the accused may be proceeded against in a district where he could not be prosecuted under the other. The procedure under one differs in some important particulars from that admissible under the other, and the accused is subject to a measure of punishment under one not possible under the other. Thus, under Section 3894 an indictment will lie in the district in which the defendant caused the letter to be delivered by the mail to the person addressed. That is not the case under Section 5480. Under Section 3894, one may be imprisoned not longer than one year, while under the other he may be imprisoned for eighteen months. Under Section 3894, he is subject to indictment for any number of violations. Under the other the indictment may only charge offenses to the number of three committed within the same six calendar months" (*Italics ours*).

The indictment was quashed.

This case is a perfect analogy to the situation now presented to this court. Unless these two statutes be construed together so as to disclose the legislative intent to describe a fraudulent intention for the one and not for the other, we shall be in a position of saying that the legislature enacted two statutes on the same day and that the Governor of New York State approved two statutes on the same day creating the same offense punishable the same way, leaving it to the District Attorney to elect as to which he would proceed under. Even if the grammatical construction of the sections did not so clearly warrant the interpretation urged by this brief, this court should be slow to construe the statutes in such a way as to lead to such an assumption.

The case of *MacDaniel vs. U. S.*, 87 Fed., 324, in which a writ of certiorari was refused by this court, in 171 U. S., 689, followed the same rule of construing two statutes in *pari materia* together so as to discern the legislative intent. In this case the indictment charged the defendant with conducting a lottery business through the United States mail under an assumed name. There was a demurrer to the indictment. The indictment was brought under the statute approved March 2nd, 1889, providing, first, that the use of the mails for sending counterfeit money or other certain devices therein mentioned is criminal, and, secondly, that anyone using the mails for any "scheme or device mentioned in the preceding section or any other unlawful business whatsoever," *under an assumed name*, shall be punishable etc. Another statute, Revised Statutes, Section 3894 as amended by Act of September 19th, 1890, provided that no letter concerning a lottery scheme was to be transmitted through the United States mail. It is to be noted that the second statute (Revised Statutes, Section 3894 as amended by Act September 19th, 1890) said nothing about the

business being conducted under an assumed name. Nevertheless, the indictment was one for conducting a lottery business through the United States mail *under an assumed name*.

The court held, however, that both statutes referred to the same subject-matter, to wit, the use of the United States mails, and that as such they were to be construed together as *in pari materia*. As so construed, the Court held that the words in the first statute, "or any other unlawful business whatsoever" would be held to include the unlawful business set forth in the second statute, to wit, the lottery business.

This rule of construing statutes *in pari materia* together so as to arrive at the legislative intent has been followed time and again by this court.

Chott vs. Ewing, 237 U. S., 197;
Richardson vs. Harmon, 222 U. S., 96;
White vs. United States, 191 U. S., 545,
 551;
McChord vs. Louisville & Nashville R. R. Co., 183 U. S., 483, 497;
District of Columbia vs. Hutton, 143 U. S., 18, 26;
Nobles vs. Georgia, 168 U. S., 398.

The highest court in the State of New York has also approved and followed the rule of construing statutes *in pari materia* together. The Court of Appeals in *Smith vs. People*, 47 N. Y., 330, said at page 339:

"Statutes enacted at the same session of the Legislature should receive a construction, is possible, which will give effect to each. They are within the reason of the rule governing the construction of statutes *in pari materia*.

Each is supposed to speak the mind of the same legislature, and the words used in each should be qualified and restricted, if necessary, in their construction and effect, so as to give validity and effect to every other act passed at the same session."

People vs. Fitzgerald, 180 N. Y., 269, 275;
People ex rel Onondaga County Savings Bank vs. Butler, 147 N. Y., 164, 168;
Mayor vs. Eighth Avenue R. R. Co., 118 N. Y., 389, 396.

Following the grammatical construction of the sentences in each section and construing them together so as to give each an effect, if possible, the conclusion seems inevitable that Chapter 580 is different from Chapter 581 in that it does not prescribe for each of its provisions a fraudulent intent.

In the court below the appellee cited the cases of *Baender vs. Barnett*, 255 U. S., 224; *Verona Central Cheese Co. vs. Murtaugh*, 50 N. Y., 314; *Omaecheeraria vs. Idaho*, 246 U. S., 343, in support of the proposition that no prosecutions will be had under a law such as Chapter 580, unless there is a wilful intent to defraud present as a necessary element. It is to be observed at the outset that none of these cases dealt with the construction of statutes in *pari materia*. Each of these cases therefore is clearly distinguishable. There are, however, other distinguishing features present in each case.

Baender vs. Barnett cited *Supra*, involved the construction of a section of the Criminal Code of the United States which declared "that whoever, without lawful authority, shall have in his possession" any die similar to the die designated for currency should be subject to the penalties therein described. The original statute prior to the amend-

ment required an intent to fraudulently or unlawfully use the same. The court merely construed "possession" under the amended section as meaning a conscious and willing possession and that mere physical control or unconscious custody was not sufficient to make out the crime. There was therefore, no implication of any unlawful intent but merely a reasonable construction of the word "possession" employed in the statute.

In *Verona Central Cheese Co. vs. Murtaugh*, cited *Supra*, an action was commenced for a penalty authorized under a statute for delivering skimmed and adulterated milk at the plaintiff's factory. The opinion clearly states that the act which gave the penalty sued for, only subjected the person who "knowingly" sold or supplied to any cheese factory the adulterated or skimmed milk. The intent of the act was to punish the individual for the actual and intentional violation of its provisions. The testimony tended to show that the defendant was in the management and control of the farm and that his wife, son and daughters delivered to the plaintiff's factory skimmed and adulterated milk. The plaintiff was non-suited at the close of his case. The Court held, however, that under the circumstances of the case, the acts of the wife and daughters might have been authorized by the defendant, and that the case should have been presented to the jury, as the act under consideration in the case contained an express requirement that the defendant do the acts prohibited therein "knowingly" and the only question necessary to the decision of the Court involved the right of the plaintiff to have his case submitted to the jury. Under the circumstances, any statement of the court to the effect that knowledge or intent would be applied would be mere dictum.

In *Omacchevarria vs. Idaho*, cited *Supra*, the Court distinctly refers to Section 6314 of the Re-

vised Codes of Idaho which provided in substance that in every crime or public offense there must exist a union of act and intent. This supplied the intent by means of incorporation by reference of another statute which made intent or knowledge a necessary element of the crime under the statute which was considered by the court. See discussion of the court on page 348 of *Omaccherarria* case.

POINT ONE.

IT IS WELL ESTABLISHED THAT CRIMINAL ENACTMENTS CONTAINING INDEFINITE, UNCERTAIN, AND UNASCERTAINABLE STANDARDS OF GUILT ARE UNCONSTITUTIONAL.

This Court has recently re-affirmed in the Lever Act cases (*U. S. vs. Cohen Grocery Co.*, 255 U. S., 81 *et. seq.*) the rule that in criminal legislation there are the constitutional requisites of certainty, adequate definition, reasonable precision, and of certain information, to the accused, concerning the nature of the statute he is alleged to be violating. These principles have been explicitly announced in the leading adjudications. In *U. S. vs. Cohen Grocery Co.*, 255 U. S., 81, at page 89 the Court says:

"The sole remaining inquiry, therefore, is the certainty or uncertainty of the text in question, that is, whether, the words 'That it is hereby made unlawful for any person wilfully * * * to make any unjust or unreasonable rate or charge, in handling or dealing with any necessities,' constituted a fixing by Congress of an ascertainable standard of guilt and are adequate to inform persons accused of violation thereof of the nature and cause of the accusation against them. That they are not, we are of opinion, so clearly results from their mere statement as to render elaboration on the sub-

ject wholly unnecessary. Observe that the section forbids no specific or definite act. It confines the subject-matter of the investigation which it authorizes to no element essentially inhering in the transaction as to which it provides. It leaves open, therefore, the widest conceivable inquiry, the scope of which no one can foresee and the result of which no one can foreshadow or adequately guard against."

In the case of *U. S. vs. Reese*, 92 U. S., 214, at page 220 the Court says:

"Penal statutes ought not to be expressed in language so uncertain. If the legislature undertakes to define by statute a new offence, and provide for its punishment, it should express its will in language that need not deceive the common mind. Every man should be able to know with certainty when he is committing a crime."

And again, at page 219,

"Laws which prohibit the doing of things, and provide a punishment for their violation, should have no double meaning. A citizen should not unnecessarily be placed where, by an honest error in the construction of a penal statute, he may be subjected to a prosecution
* * *"

The substitution of indefinite, uncertain, vague, and varying standards as to the interpretation of a criminal law does not give to the accused that definite degree of warning which is required by the constitution.

U. S. vs. Brewer, 139 U. S., 278, at page 288:

"Laws which create crime ought to be so explicit that all men subject to their penalties may know what acts it is their duty to avoid."

In *Tozer vs. U. S.*, 52 Fed., 917, at 919, the Court says:

"But, in order to constitute a crime, the act must be one which the party is able to know in advance whether it is criminal or not. The criminality of an act cannot depend upon whether a jury may think it reasonable or unreasonable. There must be some definiteness and certainty."

Due process of law under the 14th amendment requires that State statutes be certain, definite, and explicit in the definition of crime. This Court has held by its decisions in *International Harvester Co. vs. Kentucky*, 234 U. S., 216 and *Collins vs. Kentucky*, 234 U. S., 634, that the principles which determine the constitutionality of Congressional Legislation under the 5th and 6th Amendments are applicable to enactments of the State Legislatures under the due process clause of the 14th amendment. The rules of constitutional law, therefore, which we have quoted are equally authoritative in the case of State enactments.

POINT TWO.

THE VAGUENESS, UNCERTAINTY, AND INDEFINITENESS OF THE WORD "KOSHER" AND THE PHRASE "ORTHODOX HEBREW RELIGIOUS REQUIREMENTS, ARE DUE TO THE SOURCES, VOLUME, AND CHARACTER OF THE FOREIGN LAW WHICH IS THE BASIS OF THE STATUTE.

The very essence of this legislation is to be found in the term "kosher" and in the phrase "orthodox Hebrew religious requirements." Nowhere in the statutes is either "kosher" or "orthodox Hebrew religious requirements" defined, limited, or explained.

There is no legislative aid in the construction of these words, which incorporate in our criminal law standards never known to the common law, and drafted from a *system of jurisprudence entirely foreign to the sources of our own law*. There is no legislative definition in setting forth substantive activity. These terms are merely generalizations or summaries of the *entire corpus juris* of the Jewish Law. *They include the old testament, the oral law, the written law, commentaries, responses of the Rabbis, codifications of the body of the Jewish law, and numerous individual views of learned men.*

We have seen, *supra*, that the present causes stand on motions to dismiss the bills of complaint. The defendants did not deny the allegations therein set forth. Thus the allegations that the phrase "orthodox Hebrew religious requirements and the term kosher" are vague, indefinite, and uncertain, and are incapable of correct and common definition are admitted and true beyond controversy.

The elements that contributed to the conception of the phrase "kosher" and the multitudinous sources from which we are to determine what are the "orthodox Hebrew religious requirements" are stated in the testimony of Rev. Dr. Bernard Drachman who was called as a witness on behalf of the prosecution in the case of *People vs. Goldberger*, 168 N. Y. Supp., 578, and whose testimony was likewise used by stipulation in the case of *People vs. Atlas*, 183 A. D., 595, affirmed without opinion in 230 N. Y., 629. This testimony has been included in the moving affidavits in the record of the cases under consideration.

This testimony sets forth clearly how difficult it is to determine authoritatively what the law of kosher is in given stated facts. The Court will bear in mind that the codification of the Jewish law

by Caro, which it is alleged clearly contains the principles of the law of kosher, has never been translated into the English language. *Even assuming that the Code of Caro contained, for all practical purposes, the law of kosher from the beginning of the selection of the animal and continuing to the final disposition of the food product, we would be making a violation of the Code of Caro, published in 1565, a voluminous compilation of a foreign system of jurisprudence, written in a foreign language, a crime under the law of the State of New York.*

But even this grave difficulty does not adequately convey the plight of the ordinary inhabitant who wishes to determine, in a given instance, whether either in the choice of the animal, the ritual of slaughter, transportation, the conduct of the seller's business, the preparation of the product, and the other numerous and complex considerations which enter into the conception of kosher, the requisite regulations have been followed. But the Code of Caro is not at all comprehensive. Like any codification, the Code of Caro must be viewed in the light of the history, the precedents, and the learning known to the Jewish law prior to his time. These principles must find their origin in the bible, the oral law, the written law, the commentaries, and the responses which preceded it. There is a great rabbinical literature which contains the decisions and explanations of all the Jewish ecclesiastical authorities.

We refer to the testimony of Dr. Drachman, folios 32 and 33, Record of Hygrade Provision Co. case :

“(Witness continued) : Based upon these directions in the Old Testament, there has developed an oral interpretation and a written

interpretation of what these passages in the Bible mean. In addition to the written law as contained in the Bible, there is an oral law or tradition which is taught by the Jewish authorities to have been handed down from generation to generation.

Q. Are these oral law or traditions to which you refer in the form of commentaries? A. In the talmud, and Mishnah, Sifra and Sifrey. There are questions and answers. The cases were raised constantly from time to time in the course of history and these were submitted to the Rabbis or interpreters of the Jewish law. These are rules that regulate the religious Jewish life. They are called technically the responses of the Rabbis. *There is a great rabbinical literature, which contains the decisions and explanations of all the Jewish ecclesiastical authorities. A Rabbi in deciding a question will be guided by all of these statements as far back as the Bible.* In the talmud we have 2 great rabbinical codes known as the *Schulcan Aruch* and (—), is the great code or *corpus juris*, of the Jewish Theological Law, canon law. In addition to this there are all these Responsa: a great part of the literature in which the questions are treated.

By Mr. Wahle:

"Q. How large doctor is the bibliography in reference to this question of kosher? A. Several thousand great volumes."

The confusion thus resulting confounded the very legislature which enacted these statutes. The chapters under consideration require that where a person sells kosher or nonkosher meat in the same premises, a sign must be displayed to that effect, and

each meat must be labelled kosher or nonkosher as the case may be. In Dr. Drachman's testimony, it is clearly set forth that the sale of kosher and non-kosher meat in the same premises is distinctly disapproved.

"Q. Let us assume that there is a butcher-shop in the City of New York, with the sign kosher in front of the shop, that there is meat in that shop that is not koshered, and that chickens that are slaughtered according to the ritualistic method are brought into the butcher-shop. In your opinion if these chickens were kept in the same shop, in the same place, in the same vessels and utensils and handled in the same way as the meat not kosher would those chickens be kosher?"

I object to the same vessels and utensils.

District Attorney: I will withdraw utensils and vessels, and substitute in the same shop and in the same icebox.

A. *This state of affairs would be one that rabbinical authority would distinctly disapprove of. We do not approve of having in the one place things that are permitted and things that are not permitted. Especially, in-as-much as it was a regular state of affairs. We consider it a very great sin to mislead anyone either directly or indirectly. A condition might be partly correct and partly false and not a direct falsehood, but the impression might be created that is misleading, and a disobedience of our law and sinful as such. If a religious Jew happens to have a forbidden article of food, trafe, which he cannot conscientiously use, he may dispose of it to people who can dispose of it and use it. If he buys a mass of material, he may dispose of the forbidden things,*

because they have come casually into his possession. *It is a duty of the Rabbi to adopt such rules and regulations, when individual cases come up, according to the particular state of facts.*

Mr. Wahle: I move to strike from the record Dr. Drachman's testimony in regard to chickens,—interrupted.

By District Attorney:

Q. As I understand your answer to Judge Wahle, you said there were certain requirements of the Hebrew faith, which provided that food products be safe-guarded and secured in a particular way and that if they were not so safeguarded and so protected, that it would be considered constructively trafe, not kosher?

A. The religious Jew would not use it.

Q. *You did say that the religion provided that Jewish people should be protected from certain impositions, and that if the meat in that store were sold with the chickens that they would become trafe and not kosher?* A. Yes, sir."

The statute, therefore, by compelling a man to label some meat as nonkosher and the rest of the meat as kosher compels the defendant to do something which some Rabbi and jury may find to be a violation of the Jewish Law. If meat, which is otherwise in accordance with the orthodox Hebrew religious requirements, becomes nonkosher, merely because it is sold in the same premises as the kosher meat, under the principle of Jewish law that kosher and nonkosher meat cannot be sold in the same premises, how can a person lawfully label each kind of meat? This raises a very apparent anomaly. The practical situation is, that if the Jewish law should

be found by a Jury to be as Dr. Drachman stated, that kosher meat being sold in the same premises with nonkosher meat makes the kosher meat non-kosher, the defendant, who, pursuant to the terms of these chapters, labelled certain meat kosher, would under the very authority of those laws be committing a crime against the Jewish law.

POINT THREE.

THE CRIMINALITY OF THE COMPLAINANTS DEPENDS UPON A FINDING OF FACT BY THE JURY OF A BODY OF LAW WHOLLY FOREIGN TO THE COMMON LAW AND OUR SYSTEM OF JURISPRUDENCE.

It is an elementary principle of conflicts of law that courts will not take judicial notice of foreign law or jurisprudence. These must be proved as questions of fact. Our courts will not take judicial notice of foreign laws or principles of a foreign system of jurisprudence whether these be ecclesiastical laws or the laws of a foreign sovereignty.

In *Barter vs. McDonnell*, 155 N. Y. 83, at page 93, the Court says:

"The pleader seems to have assumed that the court would take judicial notice of the nature and powers of the Holy Roman Catholic Church, so far as its civil rights and duties are concerned, without any averment or proof upon the subject. Judicial notice is to be taken with caution, and every reasonable doubt as to the propriety of its exercise in a given case should be resolved against it. (*Brown vs. Piper*, 91 U. S. 37; 12 Am. & Eng. Ency. of Law, 151). According to the general

practice of the courts in all jurisdictions proof has been required upon the subject of church rights and powers, and whatever is to be proved must be alleged."

To the same effect are *Youngs vs. Ransom*, 31 Barb. 49, 60; *Cohen vs. The Congregation Shearith Israel*, etc., 114 A. D. 117, 119.

These cases hold that the ecclesiastical law is no part of the law of this State. Before our courts can take notice of religious precepts, practices or principles, or the law of any foreign country, their existence must be alleged and proved as issues of fact. This is the rule even as regards civil cases. The scope and effect of foreign law is proved as any other question of fact. In a criminal prosecution based upon what the jury or the judge or the appellate court might find to be the facts, the constitutional invalidity of incorporating principles of a foreign law into our penal codes is more clearly portrayed. While in civil cases, the courts will presume that the common law of a sister State is the same as the common law of the forum, *International Text Book Co. vs. Connelly*, 206 N. Y. 188, the presumption is indulged in only as to States whose legal system is based upon common law principles. In *Cuba R. R. Co., vs. Crosby*, 222 U. S. 473, Holmes, J., says at page 479:

"In the case at bar the court was dealing with the law of Cuba, a country inheriting the law of Spain and, we may presume, continuing it with such modifications as later years may have brought. There is no general presumption that that law is the same as the common law. We properly may say that we all know the fact to be otherwise. *Goodyear Tire & Rubber Co. vs. Rubber Tire Co.*, 164

Fed., 869. Whatever presumption there is is purely one of fact, that may be corrected by proof. Therefore the presumption should be limited to cases in which it reasonably may be believed to express the fact. Generally speaking, as between two common law countries, the common law of one reasonably may be presumed to be what it is decided to be in the other, in a case tried in the latter state. But a statute of one would not be presumed to correspond to a statute in the other, and when we leave common law territory for that where a different system prevails obviously the limits must be narrower still. *Savage vs. O'Neil*, 44 N. Y. 298. *Crashley vs. Press Publishing Co.*, 179 N. Y. 27, 32, 33. *Aslanian vs. Dostumian*, 174 Mass., 328, 31."

These principles definitely establish that even in civil cases the courts will not take judicial notice of foreign law and foreign statutes. There is not even a presumption that the law, even in civil cases, is the same in a foreign country as it is in the law of the forum, where the law of the foreign country is based upon a system other than the common law of England. If, therefore, the doctrine of judicial notice does not apply, foreign statutes and nonstatutory law must be proved as issuable facts. In practical effect it would mean that the question of foreign law would have to be found as a fact by the jury. Just what these statutes forbid would then of necessity become a question of fact, upon which reasonable men might very well differ.

As a practical matter, let us observe how a trial under these sections will be conducted. To prove the meaning of "kosher" and the contents of the phrase "orthodox Hebrew religious requirements."

an expert will be called to testify as to the meaning of those terms. The defendant will in his case call an expert to testify as to the meaning of the same terms. Proof will be taken on each side, and an issuable fact will be raised as to whether the State or the defense is correct in its interpretation and explanation of the word "kosher" and the phrase "orthodox Hebrew religious requirements." The Judge, not being able to take judicial knowledge of the foreign law, customs, and precedents, will then instruct the jury to find whether the State or the defense is correct in its interpretation of the Jewish law. Following that determination, the jury will then be asked to pass upon whether the defendant was guilty of such acts as would violate the foreign law so found. Practically, therefore, the determination of the defendant's guilt will be based upon the finding of fact by a jury in a controversial field. *The prohibitions of the statutes would not be fixed by an immovable standard reasonably ascertainable, but by a chance finding of a jury on facts, which inhabitants of our country have no way of determining. The jury writes the law.*

We respectfully submit that this is the condition which has led to the nullification of the numerous statutes, which we have detailed above, on the ground of vagueness, indefiniteness, and uncertainty, because they left the power of determining the prohibitions of the statutes to the varying opinions of juries and judges as to the meaning of the law, under which the individual was being prosecuted.

POINT FOUR.**NO CASE AUTHORIZES A STANDARD OF CRIMINALITY BASED UPON A BODY OF LAW WHOLLY FOREIGN TO THE COMMON LAW AND OUR SYSTEM OF JURISPRUDENCE.**

The appellees cannot point to a single case which incorporates, as a part of our criminal law, a term or concept of a system of law, wholly foreign to the common law and to our entire system of jurisprudence. They cannot refer us to any authorities which hold that we may make criminal any activity prohibited by a code of law whose origin, history, and development is totally at variance with the common law.

There are some adjudicated cases which hold that a statute may punish an offense by a term known by the common law. This definition will be sought in common law authorities and that meaning will be implied in the application of the statute.

Thus in *United States vs. Palmer*, 3 Wheaton 610, an illustrative case, a statute which referred to the term "robbery" was held to be sufficiently definite to sustain a conviction on the ground that robbery was defined with reasonable precision at the common law.

Similarly, the incorporation in a criminal statute of the term "restraint of trade" was held to be valid because of its reasonably definite and ascertainable common law meaning in view of the common law precedents and legal principles already adjudicated. *Nash vs. United States*, 229 U. S., 373.

An attempt, however, to refer to a foreign system of jurisprudence, or to define crime in terms of a system of law which does not find its origin

in the common law is, clearly distinguishable. A reference to "orthodox Hebrew religious requirements" is no more certain than a reference to the penal laws of any other foreign country, whose system of jurisprudence is utterly at variance with principles of law familiar to common law students. The cases in which an attempt is made to incorporate principles of foreign and strange systems of law are exceedingly rare. There are several cases, however, which are of extreme importance in determining the power of the legislative branch of the Government in incorporating into our system of criminal law the unfamiliar and foreign conceptions of a system of law unknown to students of our jurisprudence.

In *In re Lockett*, 179 Cal. 581, a section of the Penal Code which declared acts known as "fellatio" and "cunnilingus" to be felonies, was unconstitutional as being void for uncertainty. After reviewing numerous foreign authorities, in an attempt to learn the meaning of these terms, and indicating how varying and indefinite the contents of these words were, the Court in its opinion at page 590, says:

"With the books in confusion so hopeless we cannot say that the word has a definite technical meaning. It seems to me that without arrogating to ourselves the function of legislation we cannot definitely declare what the statute means, and that even if we could bring ourselves thus to go outside of our constitutional duty, we would be compelled to choose many conflicting definitions. Section 288a of the Penal Code is void for uncertainty as well as for the reason that it is not expressed in the English language."

The two concurring opinions also point out that these terms have no definite significance and

are not intelligible enough to be the basis of criminal prosecution.

In *U. S. vs. Smith*, 5 Wheaton, 153, an Act of Congress referred to the law of nations for the definition of the crime of piracy. The question of the constitutionality of this statute was presented to the court, and in an opinion by Story, J., the Court held, first; that Congress had power to define and punish felonies on the high seas and offenses against the laws of nations, by virtue of one of the enumerated powers contained in the Constitution (Art. 1, Sec. 8, subdivision 10), and secondly; that piracy was well known at the common law, and that the law of nations used the term in no other sense than could be found in the treatises of the common law, page 159. The court observed, moreover, that the common law was part of the law of nations, page 161, and that since the definition of piracy under the law of nations was the same as that of the common law, the argument that the term was indefinite and vague was lacking in force. The dissenting opinion of Livingston, J., however, points out very clearly the constitutional infirmity of any statute which has as its basis principles of a code of law foreign to the common law. With what Livingston, J., says the majority opinion does not find fault; but the majority merely decides that the reference to the term piracy as understood by the Law of Nations was constitutional for the reasons just stated. Livingston, J., forcefully observes, pages 181 et seq.:

"It would seem unreasonable to impose upon that class of men, who are the most liable to commit offenses of this description, the task of looking beyond the written law of their own country for a definition of them. *If in criminal cases everything is sufficiently cer-*

tain, which by reference may be rendered so, which was an argument used at bar, it is not perceived why a reference to the laws of China, or to any other foreign code, would not have answered the purpose quite as well as the one which has been resorted to. It is not certain, that, on examination, the crime would not be found to be more accurately defined in the code thus referred to, than in any writer on the law of nations; but the objection to the reference in both cases is the same; that it is the duty of congress to incorporate into their own statutes a definition in terms, and not to refer the citizens of the United States for rules of conduct to the statutes or laws of any foreign country, with which it is not to be presumed that they are acquainted. Nor does it make any difference in this case that the law of nations forms part of the law of every civilized country. This may be the case to a certain extent; but as to criminal cases, and as to the offense of piracy in particular, the law of nations could not be supposed of itself to form a rule of action, and therefore, a reference to it, in this instance, must be regarded in the same light, as a reference to any other foreign code" (Italics ours).

And again, page 182 :

"Nor is there any hardship in this, for the great body of the community have it in their power to become acquainted with the criminal code under which they live; not so when acts which constitute a crime are to be collected from a variety of writers, either in different languages, or under the disadvantage of translations, and from a code with whose provisions

even professional men are not always acquainted. By the same clause of the constitution, congress have power to punish offences against the law of nations, and yet it would hardly be deemed a fair and legitimate execution of this authority to declare that all offenses against the law of nations, without defining any one of them, should be punished with death. Such mode of legislation is but badly calculated to furnish that precise and accurate information in criminal cases, which it is the duty and ought to be the object of every legislature to impart." (Italics ours.)

In *State vs. Smith*, 30 La. Ann., 846, a statute using the term "incest" was declared void, as being indefinite on the ground that the terms did not have a definite common law meaning, although the term might have a definite meaning under the canon law.

Practical difficulties in administration arises from the drastic and onerous provisions of these enactments. Hardships result from the operation of these statutes because of the lack of uniformity in the standard of guilt created. The enforcement of the laws differs with the different views of those authorities who are entrusted with their administration. The meaning of the laws differs with the different views of those experts who are called upon to express their opinion with respect to them.

Unlike our system of jurisprudence, where there are courts of final jurisdiction, there is no final authoritative reviewing body, under the Jewish law, whose decisions are considered as final, and whose authority is undisputed. Under certain circumstances which arise from day to day, the individual Rabbi is called upon to express his view, and his judgment might very well be opposed to that of another Rabbi leaving there a wide room for an hon-

est difference of opinion. The Jewish law of kosher contains such elements as *the reputation for observing the rituals and regulations* in the maintenance of a standard of kosher. This presents a most serious situation as regards practically all of the complainants in these suits.

Their kosher business has been a part of their entire business. Portions of their factory have been set apart for the manufacture of nonkosher materials for general sale. They find themselves in a situation where they painstakingly and earnestly observe all the ritual requirements that they can conceive of in the manufacture of their kosher foods. They attempt to comply with all the rules that can be found in the numerous sources of the bibliography of the laws of kosher, and yet possibly because of their work on the sabbath, or because in the same factory they manufacture nonkosher materials, or because their own orthodoxy or piety is in question, the Rabbi may refuse to give them a label of kosher to be attached to their kosher foods. No retailer would then purchase any of their foods as kosher, and any retailers who did would be deemed guilty of fraud if he sold it as kosher, when he had bought it without a kosher label. The product would then be prepared according to every possible minute detail of the Jewish law of which the complainants would have knowledge, and might, nevertheless, because of a discretionary individual judgment of the Rabbi or because of the character or religious views of the manufacturer or vendor, be deemed to be nonkosher.

Every day juries are instructed that they may infer or imply an intent to defraud from the acts and conduct of the accused. Never are they instructed that they may infer criminal acts or criminal conduct from the mere intent to defraud. The words "intent to defraud" are a very little help in

defining a crime unless the crime itself is clearly defined. The act itself must be defined and the line must be drawn. The presence of wilfulness in a statute or the element of a specific criminal intent does not save the statute if the substantive act complained of is not sufficiently set forth to apprise the accused of its contents. This was true of the Lever Act cases where a specific intent was necessary. The difference between guilty belief and guilty knowledge is ably pointed out in the case of *People vs. Jaffe*, 185 N. Y., 497, where the defendant believing that he was receiving stolen goods was found to be not guilty of the offense because the goods were in fact not actually stolen. A specific criminal intent furnishes no aid or assistance in defining or determining what a crime is so long as the substantive acts prohibited it are varying, uncertain, and indefinite.

After reading the foregoing under this head we are perhaps better qualified to approach a consideration in the decision in the case of *People vs. Atlas*, 183 A. D., 595, affirmed without opinion in 230 N. Y., 629. Distinctions between the *Atlas* case and the cases at bar are apparent upon the reading of the original law of 1915 as unamended, and contrasting with it the drastic, burdensome, and severe requirements of Chapters 580 and 581 of the Laws of 1922. Under the *Atlas* case there was merely a question of the right of the legislature to prevent the wilful simulation of a commodity. There was no absolute and positive obligation on the part of any person to post a sign of nonkosher on his window or to exhibit signs in his store over each piece of meat or meat preparation stating that certain meats were nonkosher. The 1915 statute merely was an enactment against wilful simulation. In so far as Chap-

ter 580 of the Laws of 1922 is concerned there is nothing in the decision of *People vs. Atlas* which is determinative of the question presented by this enactment. We have shown *supra* that under several subdivisions of this chapter no specific intent to defraud is necessary. The defense of good faith is unavailable. The defendant must accept the penalties of a statute based upon a set of facts, which, as we have shown, it is impossible for the defendant to know.

Aside from the consideration that a specific intent to defraud is not necessary under Chapter 580, a feature which immediately distinguishes the situation from the decision in the case of *People vs. Atlas*, there was no absolute affirmative requirement under the law of 1915, considered in *People vs. Atlas*, compelling a defendant to post a sign of not kosher and also to label certain meats not kosher. There was no prejudicial stigma, such as the word nonkosher carries with it, necessary under the 1915 law.

While it is quite true that one can readily conceive an extreme case of palpable fraud,—an instance where pork or ham is labelled and sold as kosher, there is no statute however vaguely drawn, however indefinite, which will not clearly cover an extremely exaggerated case. The Court will recognize that even under the Lever Act there could be no question but that a person purchasing an article for one dollar and selling it for one hundred dollars would be "wilfully and feloniously" exacting an unreasonable profit. Such an extremely abnormal situation would not be proof of the definiteness of the statute. The question considered in the Lever Law cases was whether the ordinary person could, with a reasonable degree of certainty, in the ordinary case, determine whether or not he was exacting an unreasonable or unjust profit.

In the *Atlas* case cited *supra*, the Appellate Division, in discussing the constitutionality of the statute, said, at page 597:

"Counsel for the appellant argues that the word 'kosher' is an adjective, the definition and meaning of which involves a consideration of the Jewish orthodox religious requirements, which are not precise and definite, and concerning which, according to one witness, thousands of volumes have been written. It needs no argument to show that it is competent for the Legislature within its general police power to enact legislation to prevent and punish fraud and imposition. (Citing cases). If, therefore, the Legislature by the use of the word 'kosher' in this statute, meant something more than meat prepared under and of a product sanctioned by the orthodox Hebrew requirements, and the provisions of the statute for that reason would be too indefinite, still the information warranted the conviction of the defendant under the succeeding definite provisions of the statute, provided the evidence be sufficient. (Citing cases). It is manifest, however, that the Legislature did not intend to use the word 'kosher' in an indefinite sense, but evidently in the ordinary sense in which it is used in the trade, which is to designate meat as having been prepared under and of a product sanctioned by said religious requirements, and, therefore, as I view it, the Legislature has itself definitely defined the word 'kosher' as used in the statute. This construction leaves the statute sufficiently definite and confines it to those who, with intent to defraud, sell or expose for sale meat or meat preparation and falsely represent the same as having been pre-

pared under and of a product or products sanctioned by the orthodox Hebrew requirements."

We must confess our inability to comprehend the meaning of this paragraph, unless we assume that the Appellate Division took the position that the phrase "orthodox Hebrew religious requirements" is clear, precise, and definite, and easily found in an authoritative work in the English language. For that reason, they argued, if kosher means nothing more than compliance with orthodox Hebrew religious requirements, the word kosher must be clear and definite and readily ascertainable. For the purpose of argument, let us assume that kosher means compliance with orthodox Hebrew religious requirements. What are those requirements? Who can give those requirements a reasonable, common definition? Where are they to be found except in the thousands of volumes that have been written on the subject? Are they to be found in the multitude of customs, precedents, and traditions, of the oral, the written law, the commentaries, the codes, the responses of the Rabbis that have been handed down from the time of the Bible?

If the orthodox Hebrew religious requirements are so clear, why were they not set forth in the statutes? Why were they not enumerated in English so that he who reads may know the prohibitions of these criminal enactments?

It is one thing to have a vast body of traditional religious law, practice, and custom for the general guidance of the individual who is a member of that faith, and it is quite another thing to impose a jail sentence in the event of an infraction of one of these oral customs or traditions or precedents.

In a religious situation a man may very honestly give his best opinion and be in error. No serious

harm has been done from a religious viewpoint because if he finds out he is wrong, he can correct his conduct in the future, and if he does not, it is a matter between himself and his religious conscience. That same man making that same mistake, would, under a law of this kind, be subject to criminal prosecution, and upon trial his honest intentions would not be a matter between himself and his conscience, but for twelve men to pass upon, and their only guide would be the orthodox Hebrew religious requirements with all their volume, complexity, and difficulty to be ascertained.

The Appellate Division, in the opinion in *People vs. Atlas*, overlooked the inherent difficulty of the entire situation. The Appellate Division seemed to take it for granted that there are a definite bundle of rules or laws which are comprised within the phrase "orthodox Hebrew religious requirements." A mere reading of what has been set forth under this head, we respectfully submit, would seem to show conclusively that there is no such complete and authoritative definite set of rules or laws to be referred to as finally binding. There never has been any such comprehensive, finally authoritative definite set of rules or laws. From the very nature of the case there cannot be any such definite set of rules or laws, comprising as they do all of the customs, traditions, and precedents of the Jewish race stretching over a period of thousands of years, both oral and written, never comprehensively and adequately codified, never authoritatively stated, without a final reviewing body to settle the many controversial phases involved.

We do earnestly commend to this Court a serious consideration of Judge Page's dissenting opinion. He says, at page 601:

"The vice of the statute is clearly demonstrated by this information. The statute itself is so uncertain and ambiguous in its terms that no one can tell from reading it what the particular thing is that is prohibited. Nowhere is the word 'kosher' which is used in the statute defined * * *. These rules and regulations, he testified, were to be gathered from the Bible and from certain codes of Jewish law and a large body of precedents which had been established by the rulings of rabbis in response to questions that had been propounded, and he stated that the bibliography of the question of kosher filled several thousand great volumes. When the learned district attorney attempted in the information to define the specific acts which were necessary to show that the meat offered by the defendant was not kosher, there are more specifications omitted, because the district attorney confesses that they are unknown to him than are set forth with particularity."

The position we take before this Court is that these complainants have absolutely no desire to do anything but make honest and legitimate sales of their merchandise. They want to be permitted to label as kosher what they genuinely and honestly believe to be kosher insofar as they can ascertain what the requirements are, and insofar as it is humanly possible to comply with those requirements. In the modern state of affairs, it is almost impossible to comply with all of the minutiae of these requirements. For instance, it is impossible to trace a shipment from Chicago to New York so that one can be assured, with absolute certainty, that no one did any work on that shipment on the Sab-

bath. Similar difficulties can be multiplied by the hundreds. All that these complainants ask is that when they have done everything in their power to determine what is kosher and have finally labelled the article as kosher, that they should not thereby be placed in jeopardy of criminal prosecution for having failed to include one item or another, which is either incapable of performance under present modern conditions, or in which they might have made a mistake.

The Court will bear in mind that no one likes to be acquitted of a crime, and that it would be eminently unfair to any citizen to put him in a position where he *cannot know the law* until a jury says "guilty" or "not guilty." Our enlightened rules of criminal law must be of such character that the ordinary reasonably prudent man will know with reasonable certainty where the line is beyond which he may not go; that *a citizen should not be put in the position of having a jury draw that line for the first time by its verdict.*

Illustrative examples of statutes declared unconstitutional include the following:

In *Sogdell vs. The State*, 81 Texas Crim., 66, a section of the Penal Code provided that any manufacturer, importer, or agent, who sold any concentrated commercial feeding stuff with a label stating that the said feeding stuff contained "substantially" a larger percentage of protein, fat, or other ingredients, than was contained therein, was guilty of violating the section. The Court held that the term "substantially" was too vague and indefinite and that the statute was therefore void.

In *L. & N. R. Co. vs. Kentucky*, 99 Ky., 132, the Kentucky statute which provided that any railroad corporation which charged, collected, or received more than a just and reasonable rate of compensation shall be guilty of extortion, was held to be void

for uncertainty because of a failure to fix what was a just and reasonable rate by which the railroad could be governed in its conduct.

In *Ex Parte Andrew Jackson*, 45 Ark., 158, a statute which provided that it was criminal to "leave a wife and child without the means of support," was held to be too uncertain to be the basis of criminal prosecution.

In *People vs. Briggs*, 193 N. Y., 457, a penal statute which rendered it unlawful to sell milk as certified milk unless "conspicuously marked with the name of the association certifying it," was held unintelligible and therefore void.

POINT FIVE.

THE CASES RELIED UPON BY THE APPELLEES ARE DISTINGUISHABLE FROM THE CASES AT BAR.

The cases relied upon by the appellees can be easily distinguished. The first group deals with legislation calling for the labelling of definite facts such as weight, measure, ingredients, and quality. They define the standard article and fix its characteristics. The information sought is scientific, mathematical, exact, easily ascertainable, and readily reducible to scientific examination and analysis. Another group of cases deals with criteria or standards, upon which reasonable, sound, and prudent persons will be in a substantial accord in forming their judgments.

Under the first classification fall such cases as *Corn Products Refining Co. vs. Eddy*, 249 U. S. 427. In this case the statute required that a label be attached in a conspicuous place on each can sold or offered for sale with the word "compound" printed on each, stating definitely the percentage of each ingredient.

In *Hutchinson Ice Cream Co. vs. Iowa*, 242 U. S. 153, the statute prohibited the sale of ice cream containing less than a fixed per cent. of butter fat.

In *Hebe vs. Shaw*, 248 U. S. 297, the statute prohibited the manufacture or sale of condensed milk, unless it contained milk solids equal to a fixed percentage of those in crude milk, a certain percentage of such solids being fats.

In *Armour vs. North Dakota*, 240 U. S. 510, the statute required lard, not sold in bulk, to be put up in packages containing a specified number of pounds or even multiples thereof, to be labelled with the name and grade of the product, net weight, name, and address of producer or jobber.

Purity Extract Co. vs. Lynch, 226 U. S. 192, involved a statute which prohibited the sale of malt liquors.

In *Heath & Milligan vs. Worst*, 207 U. S. 338, the statute of North Dakota required manufacturers who sell certain enumerated paints to label them, showing percentages of mineral constituents.

In *Savage vs. Jones*, 225 U. S. 501, the statute provided that there should be fixed to every package a label or tag plainly showing the number of net pounds of the commodity in the package; the name, branch or trade-mark under which it was sold; the name and address of the manufacturer; and the guaranteed analysis stating the minimum percentage of fat and of protein contained therein.

There are certain other generic illustrations in the statutes such as fraudulently marking silver "sterling," New York Penal Law Section 422; or falsely marking articles "linen," Section 430; or failing properly to label mattresses, Section 444; or misrepresenting the pedigree of animals, Section 933. In each of the above the information to be labeled or branded were facts either within the

knowledge of the persons included within the provisions of the statutes or readily ascertainable, mathematical, and measurable and determinable facts. We did not have, as in the statutes before the Court, a standard of foreign law, customs, history, and institutions to be found by a jury upon a conflict of evidence, as to what was the law in a foreign system of jurisprudence.

A second group deals with statutes which contain standards of conduct or criteria of action which lead average, fair, impartial, ordinary, and prudent men to be substantially in accord in their conclusions.

U. S. vs. Standard Brewery, 251 U. S. 210, involved an indictment for selling beer which contained as much as one-half of one per cent. of alcohol. In the absence of a legislative definition of the word intoxicating, the Court held that it would not hold as a matter of law that such a percentage was intoxicating.

In *Ruppert vs. Caffey*, 251 U. S. 264, the Court held that where there was a legislative definition or standard of the word "intoxicating" that it would uphold the law. The difficulty of the varying standards of intoxicating liquors are set forth in great detail in the opinion. Where, however, the legislature has given its definition, the courts are able to apply it impartially and fairly. We respectfully submit that the holdings in the *Standard Brewery* case and the *Ruppert* case, cited *supra*, point out the difference between a varying standard to be applied and where the legislature has itself applied a criterion or standard.

Hamilton vs. Kentucky Distillery Co., 251 U. S., 146, merely involved the question as to whether the prohibition of the sale of distilled spirits is a proper exercise of the war power of Congress. No

question of the definition of any term was raised by this case.

In *Omaecherarria vs. Idaho*, 246 U. S. 343, the statute provided that any person having charge of sheep, which graze on any range previously occupied by cattle, was guilty of a misdemeanor. The prior possessory right was determined by priority in the usual and customary use of such range. The Court held that there would be little difficulty in determining the simple facts of the limits of a range and of customary occupancy. The Court, however, also specifically referred to the requirement of a specific intent on the part of the defendant. The Court says, at page 348:

“Furthermore, any danger to sheepmen which might otherwise arise from indefiniteness, is removed by Section 6314 of Revised Codes, which provides that: ‘In every crime or public offense, there must exist a union, or joint operation, of act and intent, or criminal negligence.’”

So far as Chapter 580 is concerned, where no specific intent or knowledge is required, the distinction is especially significant.

In *Miller vs. Strahl*, 239 U. S. 426, the statute provided that in case of fire, the hotelkeeper must give notice of the same to all guests and inmates thereof at once, and to do all in his power to save such guests and inmates. The statute here prescribed a rule of conduct about which reasonably would be in substantial accord.

Nash vs. U. S., 229 U. S. 373, involved the constitutionality of the Sherman Anti-Trust Act. The interpretation of this law, however, had reference to common law definitions and adjudications on restraint of trade. The body of the law was well

settled, and the particular violations of this statute were ascertainable by reference to the established precedents.

In *Waters Pierce Oil Co. vs. Texas*, 212 U. S. 86, the Court considered an act which denounced contracts and arrangements "reasonably calculated" to fix and regulate prices of commodities. The proscribed activity denounced by this law was similar to the familiar "attempt" of the common law.

In *Sligh vs. Kirkwood*, 237 U. S. 52, the statute of Florida made it unlawful to sell or deliver for shipment any citrus fruits, which were immature or otherwise unfit for consumption. Reasonable men would be substantially in accord in their judgment or determination as to whether certain citrus fruit was "otherwise unfit for consumption."

Not a single one of these cases incorporates conceptions and terms of a foreign body of law as a criterion of crime. Because of this, each case cited by the appellees is clearly distinguishable.

POINT SIX.

THE BRANDING OF ONE'S OWN PROPERTY WITH A STIGMA IS A DEPRIVATION OF PROPERTY WITHOUT DUE PROCESS OF LAW AND IS AN UNDUE AND UNREASONABLE BURDEN ON INTERSTATE COMMERCE.

The term "nonkosher" carries with it a pronounced stigma. It attaches to the commodity the idea of uncleanness, unfitness, and inferiority. In a pamphlet entitled "Jewish Dietary Laws from a Scientific Standpoint," a study by N. E. Aronstam, M. D., the following passage appears on page 4:

"In short, 'kosher' means wholesome and sanitary, while 'triefe' (not kosher) conveys

the idea of anything that is either directly unhealthy, malign, poisonous, and inefficient for the needs of the human body, or else that is indirectly capable of engendering ill consequences."

To the vast majority of the Jewish population the term "nonkosher" is a distinct reproach. The labeling of any commodity as "not kosher" is undeniably compelling the commodity to bear a badge of inferiority. In this respect an undue burden and a slander is placed upon the property. Insofar as it affects interstate commerce, there are authoritative cases which hold that a similar branding with stigmas, imposes unreasonable and undue burdens upon interstate commerce. Similarly insofar as it affects property rights it is also a denial of property without due process of law.

The burden of these statutes is extremely onerous and oppressive. The complainants are under a duty to label meats which are not kosher, according to the "orthodox Hebrew religious requirements" with a label that the same is "not kosher."

In doubtful cases the complainant is not certain whether the label that he posts is proper. Rather than face the penalties of a wrong choice, for safety's sake, he will take the lesser chance and label the goods "not kosher." In this way he not only loses the value of that particular meat but the clientele of a large number of customers who regard the other meat that he sells with suspicion, if part of the meat he sells is not kosher.

Important cases have already adjudicated that a statute which compels the branding of an article of commerce with a stigma, which annihilates its value and destroys its selling quality, is unconstitutional.

In *People vs. Hawkins*, 157 N. Y. 1, a statute required that all goods made by convict labor

should be labelled "convict made" and a violation of this law was made a misdemeanor. The defendant was indicted for offering for sale, with criminal intent, a certain scrubbing brush made by the labor of convicts confined in a prison of Ohio. The statute was held to be unconstitutional. The Court says, page 7:

"The scrubbing brush in question was beyond all doubt an article of property in which the defendant could lawfully deal. He is forbidden, however, by this statute, under all the penalties of the criminal law, from buying or selling or having it in his possession, except upon the condition that he shall attach to it a badge of inferiority which diminishes the value and impairs its selling qualities."

And again at page 7:

"The citizen cannot be deprived of his property without due process of law. The principle embodied in this constitutional guaranty is not limited to the physical taking of property. Any law which annihilates its value, restricts its use, or takes away any of its essential attributes, comes within the purview of this limitation upon legislative power. The validity of all such laws is to be tested by the purpose of their enactment and the practical effect and operation that they may have upon property. A law which interferes with property by depriving the owner of the profitable and free use of it, or hampers him in the application of it for his purposes of trade or commerce, or imposes conditions upon the right to hold or sell it, may seriously impair its value, against which the Constitution is a protection."

Freund, in his work on the Police Power, Sections 50 and 51, says, in commenting upon this case, that no man can be required to label his goods in such a way as to prejudice and destroy its value. He says in Section 51 :

"Perhaps the same objection applies to the requirement of marking goods 'tenement made' (Mass. Rev. Laws, Chap. 106, Sec. 58), unless it can be shown that such notice serves a valuable purpose, and the same principle should be generally applied to all notices where the requirement plainly indicates an attempt to harm a lawful business," and again,

"Perhaps it should be said that even where the possibility of deception exists, the requirement of particular forms of notice is not legitimate, where others are adequate, and those insisted upon are plainly intended to prejudice."

In *Collins vs. New Hampshire*, 171 U. S. 30, 33, the statute required that oleomargarine be colored pink. The Court says (p. 33) :

"To color the substance as provided for in the statute naturally excites a prejudice and strengthens a repugnance up to the point of a positive and absolute refusal to purchase the article at any price. * * * Although under the wording of this statute the importer is permitted to sell oleomargarine freely and to any extent, provided he colors it pink, yet the permission to sell, when accompanied by the imposition of a condition which, if complied with, will effectually prevent any sale, amounts in law to a prohibition."

To the same effect is *State vs. Bruce*, 55 W. Va., 384, 387.

In *ex parte Hayden*, 147 Cal. 649, the California statute required that all fruits shipped or offered for shipment in that State should have stamped and labeled, on the outside of the box or package containing same, a statement accurately designating the county and the immediate locality in which such fruit was grown. The court declared it unconstitutional on the ground that an unjust stigma was attached to the commodities, which were the subject of legislation.

In *ex parte Foley*, 172 Cal. 744, a statute which required the seller of eggs to mark on each egg the word "imported," and to display in his place of business a conspicuous sign reading "Imported eggs sold here" was declared unconstitutional on the ground that this was an onerous and oppressive statute.

POINT SEVEN.

THE STATUTES ARE UNCONSTITUTIONAL BECAUSE THEY PROVIDE FOR AN UNREASONABLE CLASSIFICATION AND DENY TO PERSONS DEALING IN KOSHER AND NONKOSHER MEATS THE EQUAL PROTECTION OF THE LAWS.

This principle of constitutional law is a guarantee that no class of business men or dealers shall be arbitrarily singled out as the victims of oppressive legislation. We have seen that the legislation under consideration is unduly oppressive upon manufacturers, dealers, butchers, and delicatessen men who deal in kosher and nonkosher meat. They are singled out arbitrarily and made the subjects of severe and drastic legislation, which compels them to post a sign on their outside window and over their commodities which is prejudicial to their

business. These appellants are arbitrarily made the particular objects of such oppressive legislation. Insofar as Chapter 580 is concerned, not even a specific intent to defraud is necessary. We refer the Court's attention to the consideration of this point in *People ex. Atlas*, 183 A. D. 595, at page 598, where the Court says, with respect to the 1915 enactment :

"It is also contended that the statute is unduly oppressive on dealers in meat. There would be force in that contention if mere proof of offering for sale or sale and the fact that it had not been so prepared would authorize a conviction; but as already observed, *intent* and *false representation* are essential ingredients of the crime."

The familiar principles of law are contained in the following authoritative cases :

Atchinson, Topeka & Santa Fe ex. Vosberg, 238 U. S. 56, 59;

Connolly ex. Union Sewer Pipe Co., 184 U. S. 540, 558, 559;

G. C. & S. Railway ex. Ellis, 165 U. S. 150, 155;

Cotting ex. Kansas City Stock Yards, 183 U. S. 79, 105;

Missouri ex. Lewis, 101 U. S. 22, 31.

POINT EIGHT.

ANY STATE STATUTE WHICH DIRECTLY AND SUBSTANTIALLY INTERFERES WITH INTER-STATE COMMERCE VIOLATES THE COMMERCE CLAUSE OF THE CONSTITUTION.

The burden upon interstate commerce of these appellants is unduly drastic. The meat prepara-

tions of the Lewis & Fox Co. are resold in the State of New York in their original packages, and as such are entitled to the protection of the commerce clause of the Constitution.

See Hipolite Egg Co. vs. U. S., 220 U. S. 45, 54;

Rhodes vs. Iowa, 170 U. S. 412, 423.

The drastic requirement concerning the posting of signs and the labeling of each piece of commodity directly interferes with the interstate shipments. Thousands of minutiae as detailed above attach with every step of the passage from the original selection of the live animal up to ultimate consumption. Any deviation, in the slightest detail, from the strictest scruple can change the quality of the meat, with its resultant criminal consequences. Then there is utter impossibility of knowing the true facts through processes and journeys so complex and numerous. Any drastic and oppressive legislation, which interferes with interstate commerce violates the commerce clause of the Constitution. This Court has so held in numerous authoritative cases.

In *Railroad Co. vs. Husen*, 95 U. S. 465, the Court had under consideration a statute of Missouri which prohibited the driving or conveying of any Texas, Mexican, or Indian cattle, between March 1st and November 1st. It was held to be in conflict with the commerce clause on the ground that the act was a direct burden on interstate commerce.

In *Voight vs. Wright*, 141 U. S. 62, a statute which required that all flour brought into the State of Virginia should have the Virginia mark of inspection, and imposing penalties for violation thereof, was held to be a substantial interference with interstate commerce.

In *Minnesota vs. Barber*, 136 U. S. 313, the Minnesota statute provided for inspection of animals, in that state, twenty-four hours before slaughtering. The practical effect of the operation of the statute was to exclude from Minnesota all fresh meat taken from animals slaughtered in other states. The act was declared unconstitutional in that it was deemed a substantial restriction upon interstate commerce.

In *Brimmer vs. Rebman*, 138 U. S. 78, a Virginia statute declared it unlawful to offer for sale within the limits of the State any meat from animals slaughtered one hundred miles or more from place at which it was offered for sale, unless previously inspected and approved by local inspectors. The law was held to be a substantial interference with interstate commerce.

See also:

People vs. Hawkins, 157 N. Y. 1;

Opinion of Justices, 211 Mass. 605;

Schollenberger vs. Pennsylvania, 171 U. S., 1;

Collins vs. New Hampshire, 171 U. S., 30.

POINT NINE.

THE DECREES OF THE COURT BELOW DENYING THE APPLICATIONS FOR PRELIMINARY INJUNCTIONS AND GRANTING THE MOTIONS TO DISMISS THE BILLS OF COMPLAINT SHOULD BE REVERSED.

Respectfully submitted,

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